No. 97-1802

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

DAVID CONN and CAROL NAJERA,
Petitioners,

v.

PAUL L. GABBERT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Barbara E. Bergman
Co-Chair, NACDL
Amicus Committee
1117 Stanford N.E.
Albuquerque, NM
87131
(505) 277-3304

John D. Cline
Counsel of Record
Freedman Boyd Daniels
Hollander Goldberg &
Cline P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Counsel for *Amicus Curiae*
National Association of Criminal Defense Lawyers

John T. Philipsborn
Counsel of Record
Civic Center Building
507 Polk Street, Suite 250
San Francisco, CA 94102
(415) 771-3801

Counsel for *Amicus Curiae*
California Attorneys for Criminal Justice

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This *amicus curiae* brief is submitted in support of the position of the Respondent Paul L. Gabbert. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1/]

[1/] As required by Rule 37.6 of this Court, *amici curiae* submit the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The NACDL submits this brief because it regards this case as part of a pattern of interference with the efforts of criminal defense attorneys to represent their clients zealously at all stages of the criminal process. Through a variety of means, including searches of attorneys and their offices, electronic surveillance of confidential attorney-client communications, violation of ethical rules that prohibit contact with represented parties, forfeiture of attorney fees, and abuse of the grand jury process, some prosecutors have sought to impede defense counsel in the performance of their duties. The NACDL has strong concern about this pattern of prosecutorial conduct.

California Attorneys for Criminal Justice (CACJ) is the largest single state affiliate of the NACDL. CACJ is a nonprofit California corporation. CACJ was formed to achieve certain objectives, including "to protect and insure by rule of law those individual rights guaranteed by the California and Federal Constitutions, and to resist all efforts made to curtail such

rights." In addition, the organization has as a purpose to engage in activities that will advance and promote "justice and the common good of the citizens of the United States." Bylaws of CACJ, Art. IV, ¶¶ A, C. CACJ is administered by a Board of Governors, made up of criminal defense lawyers practicing within the state of California. The organization has approximately 2400 dues-paying members, who are primarily criminal defense lawyers practicing before state and federal courts. These lawyers are employed both in the public and private sectors, and are distributed around the state.

Given the breadth of the issues presented in this case, CACJ appears here to urge the Court to uphold the ruling of the court of appeals on the basis that it reaches a narrow issue and justly demonstrates concern that in the unusual case, prosecutors and law enforcement officers may be held accountable for taking action that threatens the integrity and independence of the criminal defense bar and the constitutional rights of those who depend on members of the bar for the protection of their rights.

Paul L. Gabbert, the plaintiff below and the respondent here, is an attorney member of both NACDL and CACJ, and he has served on the board of directors of the latter organization.

SUMMARY OF ARGUMENT

Prosecutors Conn and Najera deliberately timed the search of attorney Gabbert's person and briefcase to prevent him from consulting with his client, Traci Baker, as she testified before the grand jury. Each aspect of the prosecutors' alleged misconduct--the search of Gabbert and the questioning of Baker when she lacked access to her counsel--raises grave concerns. But the specific misconduct at issue here cannot be viewed in isolation; the search of Gabbert while his client appeared before

the grand jury forms part of a broader pattern of prosecutorial tactics designed to interfere with the efforts of criminal defense attorneys to represent their clients zealously. Left unchecked, these tactics threaten to skew the adversarial system unfairly in the government's favor. Although this case ultimately may turn on the concepts of "liberty" and "property" under the Due Process Clause, we urge the Court to consider the potentially far-reaching consequences of its decision for the defense bar.

ARGUMENT

I. THIS CASE MUST BE VIEWED AGAINST A BACKDROP OF PROSECUTORIAL EFFORTS TO INVADE THE RELATIONSHIP BETWEEN CRIMINAL DEFENSE ATTORNEYS AND THEIR CLIENTS.

The peculiar facts of this case may tempt the Court to view it as an isolated instance of prosecutorial misconduct. Petitioners advocate precisely this perspective in analyzing the Fourteenth Amendment implications of their conduct. *Amici* disagree with this narrow approach. We believe that the specific prosecutorial misconduct at issue here must be viewed against the backdrop of a broader pattern of prosecutorial tactics intended to deter criminal defense attorneys from representing their clients zealously.

Over the past two decades, commentators have noted the increased use of investigative techniques aimed at defense attorneys. These tactics include, for example, searches of attorneys and their offices, electronic surveillance of confidential attorney-client communications, subpoenas to attorneys for information concerning their clients, use of informants at defense meetings, and contacts with represented persons without notifying their counsel. *See, e.g.*, William J. Genego, *The New*

Adversary, 54 Brooklyn L. Rev. 781 (1988); Ronald Goldstock & Steven Chananie, *"Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing,* 136 U. Pa. L. Rev. 1855 (1988); *Symposium on Prosecutorial Ethics,* 53 U. Pitt. L. Rev. 271 (1992).[2/] Although these tactics may be justified under some circumstances, their increasing use impedes defense counsel in performing the function that the Constitution assigns them.

In light of prosecutors' increased willingness to resort to these investigative techniques, petitioners' deliberate use of a search warrant to interfere with attorney Gabbert's representation of his client before the grand jury cannot be regarded merely as, to use petitioners' phrase, "a necessary interruption or delay of a person's activities." Petitioners' Brief on the Merits ("Pet. Br.") at 9. Petitioners' conduct amounted

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[2/] The *Pittsburgh Post-Gazette* recently published a series of articles detailing improper prosecutorial practices. *See, e.g.*, Bill Moushey, *Out of Control; Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights,* Pittsburgh Post-Gazette, Nov. 22, 1998, at A-1; Bill Moushey, *Hiding the Facts; Discovery Violations Have Made Evidence-Gathering a Shell Game,* Pittsburgh Post-Gazette, Nov. 24, 1998, at A-1; Bill Moushey, *The Damage of Lies; Zeal for Convictions Leads Government to Accept Tainted Tips, Testimony,* Pittsburgh Post-Gazette, Nov. 29, 1998, at A-1; Bill Moushey, *When Safeguards Fail; Grand Juries Make Questionable Calls When Prosecutors Hide the Evidence,* Pittsburgh Post-Gazette, Dec. 6, 1998, at A-1; Bill Moushey, *Wrath of Vengeance; Prosecutors Take Aim at Defense Attorneys,* Pittsburgh Post-Gazette, Dec. 8, 1998, at A-1; Bill Moushey, *Failing to Police Their Own; Justice's Oversight Office Called Ineffective, Unresponsive,* Pittsburgh Post-Gazette, Dec. 13, 1998, at A-1.

to a calculated encroachment on the ability of a criminal defense attorney to advise his client. That conduct not only hindered Gabbert's communication with Ms. Baker as she appeared before the grand jury; combined with other improper prosecutorial tactics, it sends a clear message to all defense counsel that zealous representation may subject both the client and the lawyer to government abuse. Unless condemned by the courts, that message will erode the ability of defense counsel to confront the prosecution fearlessly on behalf of their clients.

II. THE DANGERS POSED BY THE SEARCH OF ATTORNEY GABBERT AND HIS EFFECTS.

Only a few months ago, this Court emphasized the importance of the attorney-client privilege in fostering frank communication between attorney and client. *See Swidler & Berlin v. United States,* 118 S. Ct. 2081 (1998). Searches of attorneys and their effects present significant dangers to the confidentiality that the privilege protects. The increasing incidence of such searches has spawned judicial decisions,[3/]

[3/] *See, e.g., United States v. Mittelman,* 999 F.2d 440, 444-45 (9th Cir. 1993); *In re Grand Jury Subpoenas,* 926 F.2d 847, 856-58 (9th Cir. 1991); *Klitzman, Klitzman & Gallagher v. Krut,* 744 F.2d 955, 959-62 (3d Cir. 1984); *National City Trading Corp. v. United States,* 635 F.2d 1020, 1025-26 (2d Cir. 1980); *In re Search Warrant for Law Offices,* 153 F.R.D. 55 (S.D.N.Y. 1994).

critical commentary,[4/] Department of Justice Guidelines,[5/] and legislative action.[6/]

Prosecutors usually avoid unnecessary intrusion on confidential communications by issuing a grand jury subpoena to the client or, in extraordinary circumstances, to the attorney. A grand jury subpoena permits the subpoena recipient to apply to the court for a protective order, ensuring that judicial review will occur before any assertedly privileged material must be produced. *E.g., United States v. Zolin,* 491 U.S. 554 (1989). Under some circumstances, however, law enforcement officials may legitimately conclude that they must proceed by search warrant to avoid destruction or concealment of critical evidence. Because of the risk that the searching officers will view privileged communications, the decision to proceed by warrant and the manner of conducting the search require careful oversight by the court issuing the warrant and the utmost good faith by the executing officials.

[4/] *See, e.g.*, Martin G. Weinberg & Kimberly Homan, *Challenging the Law Office Search*, The Champion, Aug. 1996, at 10; Michael S. Pasano, *A Search for Justice? Ensuring Due Process in Law Office Searches,* 10 Crim. Just. 42 (1995); Lackland H. Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions,* 69 Geo. L.J. 1 (1980); Steven J. Enwright, *Note: The Department of Justice Guidelines to Law Office Searches: The Need to Replace the "Trojan Horse" Privilege Team with Neutral Judicial Review,* 43 Wayne L. Rev. 1855 (1997).

[5/] U.S. Department of Justice Guidelines, Oct. 11, 1995, *reprinted in* 58 Crim. L. Rep. 2007 (BNA 1995).

[6/] *See, e.g.*, 42. U.S.C. § 2000aa-11(a)(3); Cal. Penal Code § 1524.

This case reflects a complete absence of that essential good faith. Prosecutors Conn and Najera initially issued a subpoena to Ms. Baker, but refused to extend the return date so that Gabbert could obtain judicial review of Ms. Baker's Fifth Amendment privilege claim. When Gabbert and Ms. Baker appeared in response to the subpoena, Conn and Najera delayed Ms. Baker's testimony until they could obtain a search warrant for Gabbert. Conn misrepresented the purpose for the delay in Ms. Baker's appearance; he told Gabbert that he was preparing an immunity letter for Ms. Baker, when he and Najera actually were obtaining the search warrant. Conn and Najera then caused the warrant to be served on Gabbert at the same moment they called Ms. Baker before the grand jury.

As the Ninth Circuit observed, "The prosecutors were in control of both events: they controlled the timing of the execution of the search warrant on Gabbert and his client's grand jury appearance. The only apparent reason to have both occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." *Gabbert v. Conn,* 131 F.3d 793, 802 (9th Cir. 1997). The court added that "[t]he plain and intended result was to prevent Gabbert from consulting with Baker during her grand jury appearance." *Id.* at 802-03. *Compare In re Grand Jury Subpoenas,* 926 F.2d 847, 858 (9th Cir. 1991) (finding law office search to be "a model of government sensitivity to the special privacy interests that are implicated when a law firm's files must be searched," in part because "[t]he Government intentionally timed the search for a time of day when it would least disrupt the law firm's activities").

Apart from interfering with Gabbert's representation of his client, the search posed additional dangers. The initial search, conducted in the courthouse by a special master, intruded directly into privileged communications between

Gabbert and three of his clients, in violation of the California statute that governs searches of lawyers. Cal. Penal Code § 1524. Gabbert's efforts to protect these privileged communications, as he was required to do, Cal. Bus. & Prof. Code § 6068(e), distracted him from his representation of Ms. Baker. Then, in "flagrant disregard of statutory norms and the plain requirements of the warrant itself," *Gabbert,* 131 F.3d at 805, the prosecutors caused a detective to conduct a *second* search of Gabbert and his briefcase. And the prosecutors caused these searches to occur in the vicinity of Ms. Baker, a tactic certain to intimidate her and to erode her confidence in her lawyer.

Petitioners attempt to play down their abuse of power. They assert, for example, that Gabbert was "temporarily distracted from providing legal assistance to his client, due to the execution of a valid search warrant," Pet. Br. 9, and they warn that under the Ninth Circuit's decision "any time the government executed a search warrant on a person who was either engaged in his occupation or simply on the way to his job or place of business, the government would be in violation of the person's fourteenth amendment rights," Pet. Br. 10. But this case does not merely involve the "temporary distraction" that, for example, a cabdriver or an accountant might suffer while searched. This case involves the deliberate manipulation of a search warrant to skew the balance of power between the government and a citizen (Ms. Baker) by entangling her advocate (Gabbert) in a patently illegal search[7/] that forced him simultaneously to consider his own interest in privacy, the

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[7/] The Ninth Circuit noted the special master's "apparent disregard for the plain requirements of Cal. Penal Code § 1524" during the first search, and it found that the second search was conducted in "flagrant disregard of statutory norms and the plain requirements of the warrant itself." *Gabbert,* 131 F.3d at 805-06.

confidentiality of his client files as the special master searched them, and Ms. Baker's need for representation as she appeared before the grand jury.

III. THE IMPORTANCE OF PROVIDING REPRESENTATION TO A CLIENT TESTIFYING BEFORE A GRAND JURY.

As the Ninth Circuit noted, prosecutors Conn and Najera timed the search of attorney Gabbert to coincide with Ms. Baker's appearance before the grand jury. They did so knowing that Ms. Baker intended to assert her Fifth Amendment rights. By questioning Ms. Baker when Gabbert could not advise her, the prosecutors plainly intended to induce her to make a damaging admission or to forfeit her privilege against self-incrimination.

The prosecutors' tactics were especially pernicious in light of the importance of legal advice when a witness testifies before the grand jury. In California as in many jurisdictions, a grand jury witness appears alone. Her counsel cannot enter the grand jury room. *See* Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* §§ 6:18, 6:19 (Callaghan 1986). Alone, the witness (who usually has no legal training) must face questioning from skilled prosecutors. In this one-sided, inherently intimidating setting, a witness must depend for protection on her right to leave the grand jury room and consult counsel. *See, e.g., United States v. Mandujano,* 425 U.S. 564, 581 (1976); *Gabbert,* 131 F.3d at 801.

Even when the questioning involves solely factual matters, a grand jury witness may need to consult counsel. But when--as here--the witness may be a target of the grand jury and intends to assert her Fifth Amendment privilege, the advice of counsel is essential. A response to a seemingly innocuous

question can turn out to be incriminating, and answers to broad questions may forfeit the privilege as to underlying details. *E.g., Brown v. United States,* 356 U.S. 148 (1958). A witness needs the guiding hand of counsel to avoid these pitfalls. And it is the duty of counsel representing a witness before the grand jury to consult with the client as such issues arise. *See, e.g.,* National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 6.5 (3d ed.); *California Criminal Law, Procedure and Practice* §§ 8.11-8.14 (Continuing Education of the Bar, Berkeley 2d ed.).

Prosecutors Conn and Najera deliberately thwarted Gabbert's performance of his duty to advise Ms. Baker. The prosecutors knew that Ms. Baker would attempt to assert her Fifth Amendment rights; indeed, as a ruse to gain time to obtain the search warrant, Conn had spoken with Gabbert about furnishing Ms. Baker with informal immunity. The prosecutors knew that Gabbert had accompanied Ms. Baker so that he could consult with her outside the grand jury room about her assertion of the privilege. Knowing these facts, the prosecutors caused the search warrant to be executed upon Gabbert, summoned Ms. Baker before the grand jury, and began questioning her. The prosecutors' improper tactic had its intended effect: Gabbert, preoccupied with the special master's unlawful effort to examine files containing privileged communications, could not give Ms. Baker the advice she sought.

Two hypotheticals that petitioners offer to illustrate the alleged consequences of the Ninth Circuit's opinion in fact demonstrate the wrongfulness of their conduct. First, petitioners assert that under the court of appeals' decision, an attorney representing a grand jury witness could sue the bailiffs operating the metal detector at the courthouse if their routine search caused the attorney to miss his client's appearance. Pet. Br. 24. Nothing in the opinion below would support such a far-

fetched claim. But suppose the facts are changed to resemble this case. Suppose that the prosecutors directed the bailiffs to prolong their search of the attorney beyond their normal practice to prevent him from representing his client. Suppose further that the prosecutors, knowing that the bailiffs had detained the attorney at the prosecutors' direction, then called the client before the grand jury and began questioning her, intending to exploit the attorney's absence. Under these circumstances--closely analogous to this case--the attorney would surely have a due process claim against the prosecutors.

Second, petitioners assert that the Ninth Circuit's decision would support a claim against police officers manning a roadblock if the roadblock caused an attorney to be late to court and thus to lose a case. Pet. Br. 24-25. Again, nothing in the court of appeals' decision would support such a claim. But suppose that prosecutors conducting grand jury proceedings knew that a witness intended to appear with counsel and assert the Fifth Amendment privilege and further knew that counsel would follow a particular route to the courthouse. Suppose as well that the prosecutors instructed the police to set up a roadblock on that route to intercept the attorney. And suppose that the prosecutors waited until police notified them that the attorney had been detained at the roadblock, and then called the witness before the grand jury to begin questioning her. Here, too, the attorney should have a claim against the prosecutors for interference with his right to practice his profession.

As the Ninth Circuit aptly noted, "The prosecution and defense of criminal allegations produce ample opportunity for adversarial conflict." *Gabbert,* 131 F.3d at 797. Increasingly in recent years, those "adversarial conflicts" have taken the form of prosecutorial efforts to prevent defense counsel from representing their clients zealously. Too often courts view those efforts in isolation, in the context of a single case in which the

defendant may stand accused of a heinous crime. It may be tempting in such cases to treat the prosecutorial misconduct as an unsavory means to reach a just end. Taken in the aggregate, however, the misconduct of individual prosecutors in particular cases chills the determination of every defense attorney to confront the government's case vigorously. By thus deterring counsel from performing their constitutional function, individual acts of misconduct--such as the misconduct that Conn and Najera committed against Gabbert and Ms. Baker--corrupt our system of criminal justice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Freedman Boyd Daniels Hollander
Goldberg & Cline P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

BARBARA E. BERGMAN
Co-Chair, NACDL *Amicus* Committee
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

Counsel for *Amicus Curiae*
National Association of Criminal Defense Lawyers

JOHN T. PHILIPSBORN
Counsel of Record
Civic Center Building
507 Polk Street, Suite 250
San Francisco, CA 94102
(415) 771-3801

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